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No. 86-365

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUDOLPH G. (BUTCH) STANKO AND
GARY WADERICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the element of intent required for a felony conviction under the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*

2. Whether the district court erred in denying a post-trial evidentiary hearing and request for permission to interview jurors concerning possible misconduct.

3. Whether a change of venue was required on grounds of pretrial publicity.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 793 F.2d 232.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1986. A petition for rehearing was denied on July 2, 1986. The petition for a writ of certiorari was filed on August 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioners Rudolph Stanko and Gary Waderich were each convicted on one count of conspiracy to violate the Federal Meat Inspection Act, 21

U.S.C. 601 *et seq.*, and on six substantive violations of the Act, including two counts of by-passing meat inspection laws, two counts of selling misdated meat, and two counts of distributing adulterated meat products. Petitioner Stanko was sentenced to six years' imprisonment and fined $70,000. Petitioner Waderich was sentenced to 15 months' imprisonment. The court of appeals affirmed (Pet. App. 1-27).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2-3, 6-14). At trial, the government established that petitioners Stanko and Waderich engaged in the fraudulent distribution of adulterated meat products, the intentional circumvention of federal meat inspection laws, and the fraudulent misdating of meat shipments through their operation of co-defendant Cattle King Packing Company, Inc., a meat packing plant in Colorado that ceased operations in December 1983. Petitioner Stanko formed Cattle King in June 1981 and was in charge of its daily operations for eight months. During that period, Stanko established the policies and practices for the operation of the plant, which included misdating meat, shipping adulterated meat, and evading federal inspection of meat returned by dissatisfied purchasers. After returning to his residence in Nebraska in February 1982, Stanko maintained frequent contact with the plant, but he turned over the supervision of daily operations to petitioner Waderich, the general sales manager. Stanko instructed Waderich to follow the policies and practices Stanko had established for the operation of the plant. Stanko remained an officer and shareholder of Cattle King at all times that the plant was operating.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. Petitioner Stanko's principal contention (Pet. 5-14) is that the district court's instructions erroneously permitted the jury to find him "vicariously liable" for felony violations based upon acts in which he did not personally participate. The court of appeals properly rejected this contention.

Over Stanko's objection, the court instructed the jury that it could find Stanko guilty by virtue of his position of responsibility in Cattle King, even if he did not personally perform the acts resulting in the violation. The court added, however, that the jury could not find Stanko guilty merely on the basis of his ownership of the company (Pet. 7 n.1). Petitioner Stanko did not request an alternative instruction, although he suggested modifications to the instruction, which the court incorporated (see 29 Tr. 1988-1989).

Contrary to petitioner's contention, the court's instructions did not dispense with the element of "intent to defraud." Although the particular instruction about which Stanko complains did not refer to the element of specific intent, the court of appeals noted (Pet. App. 14-18) that other instructions sufficiently apprised the jury that petitioner's guilt depended on his possessing an intent to defraud. One instruction generally charged the jury that for each count (except one count not at issue here), a violation required proof of specific intent (*id.* at 16-17). In addition, the instruction for each substantive count stated that the jury must find that the defendants acted with the intent to defraud (*id.* at 17). It is well established that jury instructions are not reviewed in isolation, but are considered as a whole. *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Boyd* v. *United States*, 271 U.S. 104, 107-108 (1926). Accordingly, petitioner Stanko's argument that the district court erred by omitting the element of intent in one of its instructions is without merit.

Petitioner Stanko is also wrong in contending that the government must not only prove that he had a responsible corporate position and an intent to defraud, but also that he "personally" distributed meat he knew to be adulterated (Pet. 6). In *United States* v. *Park*, 421 U.S. at 673-674, this Court interpreted an analogous provision of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 331(k), to impose vicarious liability for misdemeanor offenses on corporate agents. Relying on that case, the court of appeals correctly rejected petitioner Stanko's claim and ruled that a corporate agent may be held liable for a felony violation if the corporate agent had the responsibility and authority either to prevent or promptly correct violations, and if he acted with the intent to defraud when he failed to do so. This Court in *Park* noted that under the Federal Food, Drug and Cosmetic Act, Congress has chosen to impose an affirmative duty on corporate agents to protect public health. As the Court observed, "[t]he considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability" (421 U.S. at 674). The decision of the court of appeals simply permits a corporate agent to be held liable for a felony violation where the conventional requirement for criminal conduct dispensed with for misdemeanor violations—the awareness of wrongdoing—is established by proof of the corporate agent's intent to defraud. Proof of personal participation in the actual distribution of adulterated meat is not a necessary element of the felony offense. See *id.* at 670. Petitioner is not immune, therefore, from felony prosecution under the Federal Meat Inspection Act merely because he did not personally distribute the adulterated meat.[1]

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[1]Petitioner's contention that this case "represents the first reported decision in which any defendant has been held vicariously liable for felony offenses based upon acts charged in the indictment that were actually committed by other employees" (Pet. 5) is incorrect. In *United*

2. Petitioners contend (Pet. 14-22) that the district court erred in denying their counsel's post-trial motion for an evidentiary hearing to explore allegations of juror misconduct. In the alternative, petitioners contend that they should have been granted permission to interview the jurors about those allegations. Petitioners' claim is wholly unpersuasive.[2]

Neither an evidentiary hearing nor interrogation of the jurors is necessary in the absence of reasonable grounds to believe that there is evidence of juror bias or specific misconduct that would be admissible to impeach the jury verdict under Fed. R. Evid. 606(b). No such grounds existed in

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States v. *Cassaro, Inc.*, 443 F.2d 153, 157 (1971), the First Circuit upheld the felony conviction of a corporate agent for violations of the Federal Food, Drug and Cosmetic Act, and in *Lelles* v. *United States*, 241 F.2d 21, 23-24, cert. denied, 353 U.S. 974 (1957), the Ninth Circuit affirmed a similar felony conviction.

[2]Petitioners also argue (Pet. 18-20, 22) that the district court's local rule, which prohibits a lawyer from communicating with any member of the jury during or after trial without prior judicial approval (see Pet. 18), violates their lawyers' First Amendment rights. This claim is misdirected, however, because the validity of petitioners' convictions does not turn on whether the local rule violated their attorneys' First Amendment rights. In any event, their constitutional claim is insubstantial. The local rule restricting access to jurors reflects the same policy considerations that underlie Fed. R. Evid. 606(b), which limits the scope of a juror's testimony to impeach the verdict to evidence of prejudicial extraneous information or influences injected into or brought to bear on the jury's deliberative process: the freedom of full and open debate during jury deliberations, the stability and finality of verdicts, and the protection of jurors from annoyance and harassment. See *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915). Cf. *United States* v. *Powell*, 469 U.S. 57, 66-67 (1984). Courts have consistently rejected the contention that such restrictions impermissibly impinge upon the First Amendment rights of lawyers or litigants and have concluded that the First Amendment interests of litigants and their counsel are outweighed by the jurors' interest in privacy and the public interest in the administration of justice. See, *e.g.*, *Haeberle* v. *Texas International Airlines*, 739 F.2d 1019 (5th Cir. 1984); *Big John, B.V.* v. *Indian Head Grain Co.*, 718 F.2d 143, 149-150 (5th Cir. 1983); *Gagliano* v. *Ford Motor Co.*, 551 F. Supp. 1077, 1079 (D. Kan. 1982).

this case. Petitioners' allegations of misconduct, which were based on statements made by some jurors during post-trial interviews with the local media and a letter from one juror to counsel for petitioner Waderich after the trial (Pet. 14), were all insubstantial. For example, petitioners claim that one juror "failed" to disclose during voir dire his previous employment at a meat packing plant (*ibid.*). As the court of appeals noted (Pet. App. 21), however, the juror was never asked during voir dire about his previous employment or experience in the meat packing business. Accordingly, the juror did not fail to answer honestly any question asked by the court. Cf. *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984).[3]

3. Finally, petitioners contend (Pet. 22-25) that the district court's refusal to grant their repeated motions for a change of venue deprived them of their right to a fair trial. The court of appeals properly upheld the district court's denials of petitioners' motions based on its review of the district court's extensive voir dire of the veniremen (Pet. App. 4-5).

Even when there has been widespread adverse publicity, a defendant's entitlement to a trial by a fair and impartial jury is satisfied as long as each juror is able to put aside his own

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[3]Petitioners' other allegations of misconduct similarly lack force. The letter from a juror to defense counsel upon which petitioners rely (see Pet. 15 n.3) indicates no more than post-trial vacillation by the juror about the verdict. For that reason, it falls far short of suggesting possible jury misconduct. See, *e.g.*, *United States* v. *Barber*, 668 F.2d 778, 786-787 (4th Cir. 1982), cert. denied, 459 U.S. 829 (1983); *United States* v. *Gerardi*, 586 F.2d 896, 898 (lst Cir. 1978). Likewise, petitioners' claim that jurors, noticing the presence of reporters, may have reviewed media reports of the trial is unsupported speculation, which is insufficient to require post-verdict inquiry into the jury deliberations. Cf. *United States* v. *Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984) (presence of newspapers in jury room during highly publicized trial insufficient predicate for full-blown post-verdict inquiry).

opinion or impressions and render an impartial verdict based on the evidence presented during the trial. *Murphy* v. *Florida*, 421 U.S. 794, 799-800 (1975); *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). Petitioners rely heavily on a survey that concluded that 80% of the potential jurors polled had formed an opinion that petitioners were guilty (Pet. 24). Even if the survey were accurate, it purports to reflect only the opinions and beliefs of the potential veniremen. The relevant inquiry for purposes of determining whether petitioners could (and did) receive a fair trial is whether the jurors who were actually selected "had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton* v. *Yount*, 467 U.S. 1025, 1035 (1984). The district court's voir dire, not the survey, directly addressed that issue.

As the court of appeals concluded (Pet. App. 4), the record of the voir dire fully supports the district court's conclusion that the pretrial publicity did not result in any actual prejudice. Eight of the 14 jurors had not heard or read about the case (*ibid.*). The district court carefully examined the remaining six jurors to determine the impact, if any, of the pretrial publicity and determined that each juror would render an impartial verdict based on the evidence (*ibid.*).[4] Petitioners do not point out even a single instance during voir dire that indicates "such hostility to petitioner[s] by the jurors who served in [their] trial as to suggest a partiality that could not be laid aside." *Murphy* v. *Florida*, 421 U.S. at 800.[5]

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[4]Petitioners now claim (Pet. 23) that the voir dire record before the court of appeals was incomplete. If that is true, petitioners should bring such a claim to the attention of the district court or the court of appeals in the first instance.

[5]Petitioners also fail to demonstrate that the amount and type of adverse publicity was either invidious or inflammatory. See, *e.g.*, *Beck* v. *Washington*, 369 U.S. 541, 555-558 (1962). Mere juror awareness that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the trial was attracting media attention is insufficient to establish prejudicial impact of the publicity. See, *e.g., Chandler* v. *Florida*, 449 U.S. 560, 581 (1981).

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